

OFFICE OF THE CITY ATTORNEY

435 Ryman • Missoula MT 59802
(406) 552-6020 • Fax: (406) 327-2105
attorney@ci.missoula.mt.us

Legal Opinion 2016-009

TO: Mayor John Engen, City Council, Mike Haynes,,Leslie Schwab, Denise Alexander, Laval Means, Jen Gress, Tom Zavitz, Drew Larson, Mary McCrea, Ellen Buchanan, Chris Behan, Marty Rehbein, Kirsten Hands

CC: Department Attorney

FROM: Jim Nugent, City Attorney

DATE April 6, 2016

RE: Limited Authority Granted to City of Missoula Historic Preservation Commission by City Council Adopted Ordinances

FACTS:

An applicant desiring a demolition permit for the Merc building located at the intersection of Higgins and Front in downtown Missoula has a demolition permit application pending at the City of Missoula that is currently scheduled for a public hearing and review within the limited authority provided to the historic preservation commission by the Missoula City Council pursuant to city ordinance. While not necessary for an application for a demolition permit, there is a project proposed for the location after demolition that is reportedly an authorized land use pursuant to the applicable zoning classification that the Missoula City Council has adopted for the land at this location.

ISSUE(S):

Is the review of an application for a demolition permit for a historic resource that is performed by the City of Missoula Historic Preservation Commission a limited review?

CONCLUSION(S):

Yes, the Missoula City Council adopted ordinance provisions pertaining to public hearing and review of a demolition permit for a historic resource are limited by the provisions of subsection 20.85.085(W) Missoula Municipal Code (MMC) to reviewing the application for compliance with Missoula Municipal Code criteria in subsection 20.85.085(W) and to “explore preservation of the historic resource”.

LEGAL DISCUSSION:

Initially, it is important to note the limited authority that the Missoula City Council has provided to the City of Missoula historic preservation commission pursuant to City of Missoula ordinance provisions set forth in section 20.90.030 Missoula Municipal Code, establishing the City of Missoula historic preservation commission. Subsection 20.90.030(A)(1) and (2) Missoula Municipal Code (MMC) set forth the general as well as the specific authority the Missoula City Council has provided to the city ordinance created City of Missoula historic preservation commission.

Subsection 20.90.030(A)(1) & (2) MMC provides as follows with respect to the limited general and specific authority granted by the Missoula City Council to the City of Missoula historic preservation commission:

20.90.030 Historic Preservation Commission

A. Authority

1. General

A Historic Preservation Commission is established for the following general purposes:

- a. reviewing and commenting on the conduct of land use, housing and redevelopment, municipal improvement, and other types of planning and programs undertaken by city, county, state or federal agencies, as they relate to historic resources;
- b. reviewing and administering guidelines and standards to be used by the Historic Preservation Commission and the historic preservation officer in reviewing applications for historic preservation permits in historic district overlay zones and areas of influence;
- c. recommending to the City Council the purchase of fee or less than fee (easements) interests in properties for purposes of historic resource preservation;
- d. providing all interested parties with information available on surveys, technology, and funding sources needed to promote historic resource preservation;
- e. preserving, restoring, maintaining or operating historic properties under the ownership of the Historic Preservation Commission;
- f. reviewing applications, permits and environmental impact statements pertaining to historic resources or historic districts;
- g. approving or disapproving applications for historic preservation permits as outlined in Error! Reference source not found.;

- h. rendering advice and guidance upon request of the property owner regarding restoration, alteration, decoration, landscaping or maintenance of any historic resource;
- i. performing all other duties imposed or authorized by this zoning ordinance or the Municipal Code; and
- j. delegating appropriate responsibility to the historic preservation officer.

2. Specific

The Historic Preservation Commission has the duty and authority to:

- a. Review and comment on actions that impact historic resources, including:
 - (1) City, state and federal planning programs;
 - (2) Environmental assessments, environmental impact statements and other similar documents;
 - (3) Rezoning and amendments to this zoning ordinance;
 - (4) Zoning variance applications; and
 - (5) Subdivision plats and other development proposals.
- b. Consult with the city regarding the acquisition of:
 - (1) Eligible or listed historic resources
 - (2) Easements or other less-than-fee-simple interests in historic resources; and
 - (3) Rights of first refusal to purchase historic resources.
- c. Provide the public with informational, educational and interpretative programs regarding historic preservation; and
- d. Apply for and receive funding to further the city's historic preservation goals.

The above quoted provisions of Missoula Municipal Code (MMC) establish city ordinance adopted limitations on the authority of the City of Missoula historic preservation commission. While most of the authority identified in subsection 20.90.030(A)(1) & (2) MMC is not relevant or triggered by an application for a demolition permit for a historic resource, the following provisions might potentially be of some authority relevance depending on the factual circumstances that evolve with respect to the site location where the demolition permit is requested to be utilized.

20.90.030 MMC HISTORIC PRESERVATION COMMISSION:

A. AUTHORITY

- (1) General (c) recommending to the City Council the purchase of the fee or less than fee (easements) interests in properties for purposes of historic resource preservation; . . .
 - (h) rendering advice and guidance upon request of the property owner regarding restoration, alteration, decoration, landscaping or maintenance of any historic resource;
- (2) Specific duty and authority to
 - (a) Review and comment on actions that impact historic resources . . .
 - (b) Consult with city regarding the acquisition of eligible and listed historic resources, easements or less than fee interests in historic resources as well as rights of first refusal to purchase historic resources.
 - (c) Provide the public with informational, educational and interpretative programs regarding historic preservation; and
 - (d) Apply for funding to further historic preservation goals.

The Missoula City Council adopted specific instructions to the City of Missoula historic preservation commission are limited as well by Missoula City Council ordinance adoption. Subsection 20.85.085(W) MMC pertains to historic preservation commission review of a demolition permit application. Subsection 20.85.085(W) MMC states as follows:

W. Criteria and Procedure for Review of Relocation and Demolition Historic Preservation Permit

1. Criteria for Review:

The Historic Preservation Commission shall review the HPP application for compliance in accordance with the following criteria:

- a. The applicant has consulted with the Historic Preservation Commission and the State Historic Preservation Office, and made a good faith effort to find an alternative that would result in the preservation, renovation, or reuse of the historic resource;
- b. The applicant has advertised the Historic resource for sale in a local newspaper of general circulation for a period of 30 days;
- c. The applicant's good faith efforts to find a purchaser interested in acquiring and preserving, renovating, or reusing the historic resource have failed
- d. Denying the application would prevent all reasonable economic use of the property; and
- e. The applicant shall provide the historic preservation officer supporting documentation demonstrating that the above criteria are met.

2. Relocation and Demolition Delay:

Upon receipt of a completed HPP application for demolition or relocation, the Historic Preservation Commission may impose a relocation or demolition delay for 90 days to allow sufficient time to explore preservation of the historic resource.

3. Mitigation:

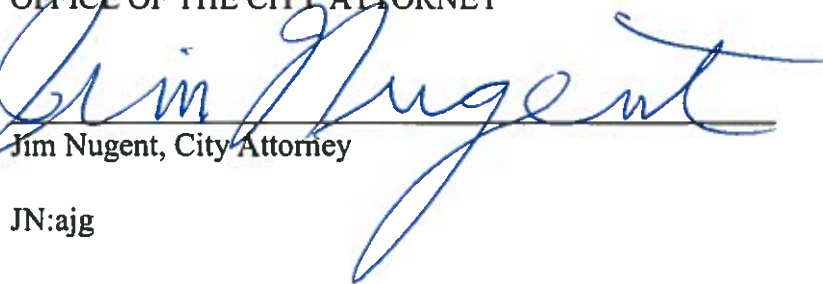
- a. If an HPP for relocation or demolition is approved, the applicant shall mitigate the adverse effects of relocation or demolition by providing, to the extent possible, documentation, similar to HABS/HAER, of the historic resource prior to undertaking the relocation or demolition.
- b. If relocation or demolition results in conversion to a use not requiring buildings or structures, such as a parking lot, the area shall be buffered from other historic resources by landscaping, walls, or fencing.

The Missoula City Council ordinance instructions to the historic preservation commission with respect to an application for a demolition permit for a historic resource are limited and are identified in subsection 20.85.085(W) MMC as being to (1) review the application for compliance with the criteria set forth in subsection 20.85.085(W) MMC and (2) explore preservation of the historic resource.

CONCLUSION(S):

Yes, the Missoula City Council adopted ordinance provisions pertaining to public hearing and review of a demolition permit for a historic resource are limited by the provisions of subsection 20.85.085(W) Missoula Municipal Code (MMC) to reviewing the application for compliance with Missoula Municipal Code criteria in subsection 20.85.085(W) and to “explore preservation of the historic resource”.

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Jim Nugent, City Attorney

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